No. 110.

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Brf. of Coleman for Appellees

In the Supreme Court of the United States.

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October Term, 1901.

WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD and EVA HANMORE, Appellants,
vs.
LEFFERT L. BUCK and JAMES COLEMAN, *Appellees.*
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Brief of J. Coleman for Leffert L. Buck, Appellee.

JAMES COLEMAN,
Solicitor for Complainant Leffert L. Buck.

PRESS OF BYRON S. ADAMS.

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The bill in this action is filed to enjoin a suit at law, No. 41,274, which is an action of ejectment brought to recover the possession of an undivided one-third of the premises known as 1632 Rhode Island Avenue.

The bill was filed April 15, 1898. The appellees are Leffert L. Buck, who claims to be the owner of the premises, and James Coleman, lessee under Buck. The appellants are William H. Brainard—the plaintiff in the ejectment suit—and others, some of the heirs at law of Charles F. Brainard, deceased, who, in his lifetime was the owner of the premises. (R., pp. 1–8.)

To the bill filed, the defendant Brainard demurred, and the demurrer was sustained by the Court, Mr. Justice Cox, *with leave to the plaintiffs to amend their bill within twenty (20) days from the date of the order sustaining the demurrer.* (R., pp. 14–15.)

On the 21st day of May, 1898, the plaintiffs filed the amended bill.

The parties to the original and amended bills are the same.

The property described is the same in both bills and the same relief is prayed; that is that the property be decreed to be charged with a trust in favor of the plaintiff Leffert L. Buck.

The only difference in the bills being, that the amended bill alleges facts regarding the transaction stated in the original bill, which in that bill were not so fully set forth and disclosed.

The *amended* bill, after stating the citizenship and residence of the parties and the pendency of the suit at law, states:

That one Charles F. Brainard, on the 12th day of June, 1872, executed his last will and testament, by which he devised all of his property, real and personal, to his wife, Cornelia A. Brainard; that on the 18th day of July, 1879, Brainard acquired title to the premises in question; that on the 31st day of March, 1882, after the death of the said Charles F. Brainard, his widow conveyed the premises to the plaintiff, Leffert L. Buck; that Brainard died on the 13th day of May, 1881, and his widow on the 31st day of March, 1892; that the plaintiff Buck is the brother of Cornelia A. Brainard; that her husband, in his lifetime, had little or no means of support, except his salary as clerk in the Treasury Department.

That during the lifetime of Brainard, the plaintiff, Buck, who lived in the city of New York, and was a civil engineer by profession, entered into an agreement with Brainard by which he, Brainard, was to invest for Buck, in interest-bearing securities, such sums of money as Buck should from time to time send him for investment; that pending said agreement, and after the said Brainard had received from Buck considerable sums of money, they entered into a further agreement by which they were to, and did, purchase the premises in question for the sum of $6,350.00, each to pay one-half of the purchase-price of the property; that Brainard purchased the property and took the title to himself in his own name without the knowledge or consent of Buck; that at the time of the purchase he paid $2,550.00 out of

the money belonging to Buck ; that subsequently he made a further payment on the property of $1,266.00 ; that after the death of the said Charles F. Brainard the said Buck paid the sum of $1,971.82, the balance of the purchase-money due on said property.

That after the death of her husband Cornelia A. Brainard, believing that she held the legal title to the property, and in consideration that her brother, the plaintiff Buck, had paid for the same, conveyed the property to him, and she continued to reside thereon until the time of her death, when the plaintiff, Leffert L. Buck, went into possession of said property, and has ever since been, and now is, in possession thereof. That he had no knowledge that any other person or persons than himself had any other claim against the property, until the commencement of the suit at law.

That at the time of the death of the said Charles F. Brainard, he left surviving him two sisters and three brothers, so that the claim of the defendant, William H. Brainard, if sustained, would be to an undivided one-fifth of the property in question.

That the plaintiff Buck paid the entire amount of the purchase-money of said property, and that neither the said Charles F. Brainard, nor any of his heirs, paid any portion thereof.

The bill concludes with a prayer, that it should be decreed by the Court that the said land was charged with a trust in favor of the plaintiff, for the use and benefit of the said plaintiff Buck, and that such as may claim the legal title thereto may be decreed to convey the same to him. (R., p. 19.)

To this amended bill the defendant William H. Brainard demurred, which *demurrer is identical with the demurrer to their original bill*, the only difference being that the demurrer to the amended bill contains one more ground of demurrer in that the two bills state a different cause of action. (R., pp. 16–20.) *The demurrer was overruled*, whereupon the said defendant answered, admitting some and denying others of the allegations of the amended bill. (R., pp. 21–22).

This answer of the defendant William H. Brainard is under oath. In it he states (Par. 9) that he denies *not on*

information and belief, that the plaintiff Leffert L. Buck ever sent any money to the said Charles F. Brainard for investment—or that the said Charles F. Brainard was ever instructed to purchase, or did ever purchase, any real estate on behalf of the plaintiff Leffert L. Buck, but on the contrary, he says that the said Charles F. Brainard was a clerk in the Treasury Department as aforesaid, and having no time of his own in which to speculate in stocks and bonds, *at various times sent money to Leffert L. Buck to invest for him, the said Charles F. Brainard.*

And he further states in his answer, under oath: That he specifically *denies that any money whatever that belonged to the plaintiff Buck was ever invested in the said property by the said Charles F. Brainard.* (R., p. 23, Par. 9.)

We call attention especially to these statements in the defendant's answer, and to the fact that it is under oath, for the purpose of showing the reckless manner in which the defendant William H. Brainard interposes his defense.

POINTS.

I.

If the Original and Amended Bills state different causes of action, the Appellants' remedy was, not by demurrer, but to strike the amended bill from the files.

Jones *vs.* Van Doren, 130 U. S., 684.

II.

The Demurrer to the Amended Bill having been overruled, it follows that if the Court shall find that the Evidence sustains the Bill, the Decree of the Court below should be affirmed; unless the Court should also find that the Court below erred in permitting the Plaintiffs to amend their Bill.

This we submit was not error.

Story's Eq. Pl., 884.

Hardin adm. & oth. *vs.* Boyd & oth., 113 U. S., 756.

III.

If the property in question was paid for by the plaintiff, Buck, or with money in the hands of Charles F. Brainard, belonging to said Buck, an implied or constructive trust is created by operation of law, by which the property became vested in him.

Anderson's Law Dict., Tit. Trusts.
Perry on Trusts, Sec. 168.
Pomeroy's Eq. Jur., p. 1049.
1 Story's Eq. Jur., p. 187.
Adams' Equity, p. 36.
Mich. Ry. Co. *vs.* Mullins, 44 Mich., 321.
Johnson *vs.* Dougherty, 18 N. J. eq., 406.
Watson *vs.* Thomas, 12 R. L., 446.
McMurray *vs.* Mobley, 13 Ark., 309.
Hall *vs.* Linn, 8 Cal. 264.
Conant *vs.* Risenborough, 139 Ill., 383.
Smith *vs.* Profitt, 82 Va., 832.
Ballock *vs.* Hooper, 6 Mack., 421.
Furgeson *vs.* Williamson, 20 Ark., 272.
McDonald *vs.* McDonald, 24 Ind., 64.
Hiddon *vs.* Jordan, 21 Cal., 92.
Fallanchee *vs.* Kilbreth, 17 Ill., 522.
Brown *vs.* Dudley, 45 Me., 52.
Chastain *vs.* Smith, 30 Ga., 96.
Smith *vs.* Boquet, 27 Tex., 507.

IV.

The plaintiff, Buck, is not chargeable with laches in not asserting his title to the premises.

Ruckman *vs.* Corey, 129 U. S., 387.

V.

The defendant, William H. Brainard, is not entitled to relief, neither should he be permitted to prosecute his suit at law by reason of his laches.

Richards *vs.* Mackall, 124 U. S., 187.
Speidel *vs.* Henrici, 120 U. S., 377.

Brown *vs.* Buena Vista, 95 U. S., 806.
Crutchfield *vs.* Hewett, 2 D. C. App., 373.
Cammack *vs.* Carpenter, 3 D. C. App., 219.
Baker *vs.* Cummings, 4 D. C. App., 273.
Levis *vs.* Kengla, 8 D. C. App., 270.

ARGUMENT.

I.

By an examination of the Case in Jones vs. Van Doren, *supra*, it will be seen that the proper practice was for the Appellant to have moved to strike the amended bill from the files instead of to have Demurred.

However, we submit that it was a proper exercise of discretion on the part of the Court below to permit the Plaintiffs to amend their bill.

> Amendments by the plaintiff amending the bill may be useful for various purposes; for the correction of mistakes; or for the suppression of impolitic admissions in the original statements; or for adding new parties; or *for enquiring into additional facts; or for the further investigation of facts, which have been only partially disclosed;* or for putting in issue new matter stated in the answer."
>
> Story's Eq. Pl., Sec. 834.

a. The amendment of the bill in this case was made before answer. It worked no surprise to the defendants and they were not inconvenienced by it.

b. The parties to the bills are the same. The property sought to be affected by each is the same. They each pray that a trust may be declared in favor of Leffert L. Buck, upon the property in question for the reason that it was purchased with his money and that he paid for it.

c. Whatever difference there is, is not in matter of substance, but in the way of stating the same facts which constitute the plaintiffs' cause of action. The original bill states that the property described was paid for with money advanced by Mr. Buck. The amended states how it was advanced, that is that Brainard had money in his hands belonging to Buck, and used it in paying for the house.

d. Each of the bills in question proceed upon the theory that Brainard took the conveyance of the property described in the bill charged with a trust, either constructive or resulting in favor of the plaintiff Leffert L. Buck, by reason of the fact that Buck's money paid for the property.

We submit that had the case gone to a hearing on the original bill, and the plaintiffs had offered the same evidence that they did, the Court would have permitted the bill to have been amended and rendered a decree in favor of the plaintiffs.

The defendant could have had no reasonable ground to have objected, and substantial justice would have required and sanctioned it.

In 121 U. S. the court say:

> "The various matters therefore, contained in the amended bill and the original bill were thus connected with each other in such a way as fairly to bring the question of granting leave to file the amended bill within the discretion of the court below. In reviewing the exercise of that discretion on this appeal, we should not feel justified in any case in reversing the action of the Circuit Court, if it appeared that the appellants were not put to any serious disadvantage or materially prejudiced thereby."
>
> Richmond *vs.* Trous, 121 U. S., 27.

But the bill was amended in this case before any evidence had been taken, so that the defendant was not taken by surprise, and suffered far less inconvenience than he would had the bill been dismissed and the plaintiff been compelled to bring another suit.

And the Supreme Court say, in 9 How.:

> "To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authoritities."
>
> Neale *vs.* Neales, 9 How., 1.

Justice Harlan says, in Hardin *vs.* Boyd, 113 U. S., 756:

> "If the bill be found defective in its prayer for relief, or improper parties, *or in the omission of statement of facts or circumstances connected with the substance of the case*, but not forming the substance itself, the amendment is usually granted."

In Jones *vs.* Van Doran, 130 U. S. 684, the bill alleged that a widow conveyed her dower upon an express trust, and the bill was permitted to be amended by alleging that she was induced to make the conveyance by fraudulent misrepresentations.

The court say by Mr. Justice Gray:

> "The only difference between the amended and original bills is that the first alleges that the defendant Jones took the conveyance of the plaintiff's right of dower upon an express trust for her, whereas, the second alleges that he procured the conveyance from her by fraudulent misrepresentations as to the nature of the instrument, creating a trust by operation of law in her favor. The other facts alleged in the two bills are subtantially identical. Each bill proceeds upon

the ground that the defendant Jones was a trustee for the plaintiffs, and that the defendant Van Doran, taking the land from him with notice of all the facts, was affected by the trust; and the object of both bills is the same to obtain the right of dower of which the plaintiff has been deprived by the acts of the defendants, and to which she was entitled under the laws of Minnesota in force at the time of her husband's death. The amendment was therefore one which the court in the exercise of its discretion might properly allow, and the motion to strike the amended bill from the files was rightly denied."

Harding *vs.* Boyd, 113 U. S., 756.

II.

It will be seen that no claim is made on the part of the appellants that any of the heirs of Charles F. Brainard ever paid anything on account of the purchase of the property in question. Neither is it claimed that Charles F. Brainard, in his lifetime or his widow in her lifetime, were ever under any obligations to the heirs of Charles F. Brainard for any aid, assistance or support given them.

Their claim is based solely because of a mistake made by Charles F. Brainard and his wife and the plaintiff Leffert L. Buck, in supposing that the title of this property was conveyed by the last will of Charles F. Brainard, conveying all his property, real and personal, to his wife. After the lapse of many years some person discovered that the property in question was purchased after the execution of the will, and for that reason it did not convey to the wife this property, as it was "after acquired" property.

The defendant, William H. Brainard, upon being urged at great length on cross-examination to tell from whom he received the knowledge of his right to claim title to any portion of the property, or when he received it, and whether or not he had entered into an agreement with any one regarding compensation for the prosecution of this suit, to be paid out of the property, did not give any excuse or reason for his long delay in asserting title to the property.

The object of this cross-examination, to the extent it was conducted, was for the purpose of testing the good faith of the defendant in asserting title to the property in question, and was in the light of the decisions of the Supreme Court of the United States, and particularly the case of Speidel *vs.* Henrici, 120 U. S., 387, where the Court says:

> "Independent of any Statute of Limitations, courts of equity uniformly decline to assist a person who has slept upon his rights, and *shows no excuse for his laches* in asserting them. * * * Nothing can call forth this Court into activity but *conscience, good faith and reasonable diligence shown.* Where these are wanting the Court is passive and does nothing."

The same language is used by the Court in the case of Sullivan *vs.* Portland & C. R. R. Co., 94 U. S., 812.

This testimony of the defendant on his cross-examination showed that he had no right merely as a matter of right between the parties to assert any claim to this property. He had never paid anything for it, and there were no financial relations existing between him and Charles F. Brainard which gave him reason to suppose that Brainard was under obligations to him.

He had known since the death of Charles F. Brainard, or is presumed to have known,—a period of nearly seventeen (17) years,—that the grantees, or those taking under Brainard's will, were in possession of the property. He had permitted Mr. Buck after he had come into possession to dispose of all the personal estate without protest, and to pay upwards of $1,900.00 of an indebtedness for the purchase-money of the property, and we submit that it was his duty to have told frankly and honestly all he knew regarding it, before he could ask a court of equity to give him relief.

But, however this may be, the evidence we submit proves, beyond question, that the property was paid for by Mr. Buck, or by money belonging to him in the hands of Charles F. Brainard, in his lifetime.

Mr. Buck, in his evidence, gives a frank and honest statement of all he knows regarding the transaction. He is a man of character, standing high in his profession, and

a man who has made money, and had money to invest. He was a member of the Inter-Continental Railroad, Commission; he as civil engineer rebuilt the old suspension bridge at Niagara Falls, as he has testified, and bought the property in question for the purpose of giving a home to his sister, who was the wife of Charles F. Brainard.

He testified, in his testimony (R., 27–28):

> "I was preparing to go to Peru, South America, to work at my profession. Previous to going, I had a little money, which I requested Mr. Brainard to take and invest for me, as my agent, telling him that from time to time, as I had money for him to invest for me, I would send it to him for that purpose. While I was there, I continued to send him money, as I had it to spare, for investment, and he continued to invest it." (R., pp. 27, 28.)

He further testified that he continued to send him money after his return home.

He testified (R., p. 28):

> "About 1878, as I had no settled home, I suggested to him that we buy a house together, on shares, for my part as headquarters, and to be a home for himself and wife. (R., p. 28.)

That he was unmarried at that time and has remained so since. That they finally bought, in pursuance to this arrangement, the premises in question, 1632 R. I. Ave., for $6,350.00. (R., p. 28.)

Mr. Brainard was ill at this time, and had no children, and he had made his will giving all his property to his wife, and he had informed Mr. Buck that at his death all the property would go to her. Mr. Buck testified:

> "He said that in any event, if he should be taken away, the property would all go to his wife, all he had; and he also gave me a statement of the transactions which he had and I had in regard to the money."
>
> Q. "Was that statement in writing?
>
> A. "It was in his own handwriting.
>
> Q. "And have you that statement?" (R., p. 29.)

The statement was subsequently in the course of his examination produced and offered in evidence. This statement is Exhibit A. (R., pp. 73–74.)

It does not appear at what time particularly it was given to Mr. Buck, but it was after the purchase of the property, and as Mr. Brainard died in 1881, it was some time between the purchase of the property in 1879 and the date of his death, and it shows the amount of money that Mr. Buck had put into the property, or that Mr. Brainard had put into the property for Mr. Buck, of his money at that time.

He had Mr. Buck's money. He had been disappointed in obtaining money to put into the property himself. The business association in which he had his money had failed. He then desired an understanding with Mr. Buck regarding their relative positions as to this property, and he gave him this statement, which is in part as follows:

> "Mend. of basis for settlement:
> Cost of property 1632 R. I. Ave.....$6,350.00
> One-half cost of property..... ..... 3,175.00
> Leffert L. Buck has paid on account of this property..... .... 3,816.66
> Cost of one-half of property..... ... 3,175.00
>
> Amt. due Leffert L. Buck, acct. purchase. $641.66"
> (R., p. 69.)

This is his statement in writing to Mr. Buck, showing the amount paid by him out of Mr. Buck's money on account of this property.

Add to this amount of $3,816.66 the sum of $1,971.82, which he testifies (R., p. 32) he paid on the house, after Mr. Brainard's death, and at the time of the conveyance to him by Mrs. Brainard.

> "I sent $2,000.00 to her in New York in the form of a certificate of deposit on the American Exchange National Bank of New York, to finish paying for the house."

And he produced in evidence the certificate of deposit with the endosements on it of himself and Mrs. Brainard. (R., p. 37.)

> "Leffert L. Buck has deposited in the American National Exchange Bank $2,000.00, payable to the order of himself, on return of this certificate properly endorsed."

The date is March 17th, 1882.

The amount of the mortgage was not quite as much as $2,000.00, but was $1,972.81. (R., pp. 38–39.)

Add to this sum $3,816.86, and it shows that he had paid at that time $5,789.47 out of Mr. Buck's money, which, deducted from $6,350.00, the amount of the purchase-money of the property, left to be accounted for as having been paid by him out of his money, the sum of $560.53.

For the purpose of showing to the Court that this balance was paid out of money belonging to Mr. Buck, the plaintiffs offered in evidence a private account book, kept by Mr. Brainard, in his lifetime, of his dealings and transactions with Mr. Buck, and this book shows, that he had in his hands over and above the amount covered by this statement, and by the certificate of deposit the sum of $793.83 of Mr. Buck's money, which he charges himself with on the book as being money belonging to Mr. Buck, and used by him in making payments on the house. (See Book.)

It is evident Mr. Brainard had no means outside of his salary, for Mr. Buck testified that after Mr. Brainard's death, he paid the undertaker's bill and took the remains to Canton, New York, and buried them in his family lot and that he also paid Mr. Brainard's doctor's bill. (R., pp. 29–30.)

Some objection has been made on the part of the defendant that this book shows that money had been sent by Mr. Brainard to New York to Mr. Buck to invest for him, and the defense went to considerable expense for the purpose of showing that the entries of Dr. and Cr. were reversed in their order on the page of the book from what they deemed a proper course of bookkeeping. They claimed

that this fact alone proved this to be true. This is hardly worthy of attention.

Brainard was a man living on a salary of $150.00 a month. At least one-half of this he would have to expend in his living, which would leave him $75.00 a month.

And the defense would have us believe that, with this sum of money, for the evidence in the case does not disclose that he had anything but his salary, he sent during the year 1879, while he was in ill health, to Mr. Buck, to invest for him, the sum of $2,836.49; and between the months of January, 1880, and May, 1880, upwards of $1,000.00.

The book of account shows that this money was received by Mr. Brainard, and his entry is March 12:

"To cash received, $220.00."

And all the entries were of "cash received."

If Mr. Brainard had been sending to Mr. Buck cash to invest for him he certainly would not have entered it as "cash received." The book would show that he sent the money to Mr. Buck to invest for him.

And again, they claim, the book shows that some of this money was sent to New York to be invested in D. C. bonds. Why Mr. Brainard should be buying bonds of the District of Columbia in New York city is not explained.

As we say, that it should be claimed on the part of the defense that this evidence proves that Mr. Brainard sent Mr. Buck this money to invest for him, would be in the face of Mr. Buck's testimony hardly worthy of consideration. He testified on this point as follows:

> Q. "And this contains an itemized statement of the moneys given by you to him, and of the dates when he received it?
>
> A. "I suppose they are the dates when he received it, they are the dates that are put down there.
>
> Q. "State whether or not Mr. Brainard ever paid you any money?
>
> A. "There is about $60.00 there. I think it is. I don't remember the exact sum, but it is about $60.00, that he has put down there as paying me. That is all I know of." (R., p. 59.)

In support of the theory of the defense that Mr. Brainard sent this money to Mr. Buck, to be invested, they produced two witnesses as experts, one a young man in Fisher & Co.'s office, and Mr. E. B. Hay. (R., pp. 51–55.)

To rebut this testimony, the plaintiff presented three witnesses, each of them men of age, character and experience, acquainted with Mr. Brainard, in his lifetime, knowing his habits of business, and his manner of keeping books, each of whom testified that in their opinion, it showed the money was received by Mr. Brainard from Mr. Buck. This clearly contradicted and rebutted the theory of the defense that the moneys were sent by Mr. Brainard to Mr. Buck. (R., pp. 61–73.)

And having shown from the evidence that Mr. Buck's money paid for this property, we come to the *third* point, namely:

III.

That having paid for it an implied or constructive trust is created by operation of law, by which the title to the property in question became vested in him.

There are two kinds of trust—resulting, and implied or constructive trusts. Constructive trusts are divided by elementary writers into three classes, to be determined according to the circumstances in which they arise.

1. Trusts that arise from actual fraud.
2. Trusts that arise from constructive fraud.
3. Trusts that arise from some equitable principle independent of the existence of any fraud.

Perry on Trusts, Sec. 168.

Bouvier, in his Law Dictionary, Title "Constructive," defines the word:

> "That which amounts in the view of the law to an act, although the act itself is not really performed."

In the case at bar, Mr. Buck paid for this property, and he should have the title. He, having paid for it with his

money, equity will carry into effect the acts themselves which were in good faith performed, and perfect the title to the property which he has paid for, in him.

Anderson, in his Law Dictionary, defines "Constructive Trusts" to be:

> "Such trusts as are imposed by construction of law, from reasons of equity and justice, independent of the intentions of the parties. A trust which arises from actual or legal fraud, as when the person occupying a fiduciary position, gains an advantage to himself, personally."
>
> Anderson's Law Dict., Tit. Trusts.

In Pomeroy's Equity Jurisprudence, it is said:

> "Another form of the trust arises in the case of a person who personally receives some benefit while standing in some fiduciary relation. The doctrine is of wide application, and extends to * * * agents using the money of their principal." * * *
>
> Pomeroy's Eq. Jur., Sec. 1049.

In Adam's Equity it is said that:

> "A constructive trust is a trust created by operation of law arising from the relation in which the parties are to each other, as principal and agent."

The evidence shows that Mr. Brainard was Mr. Buck's agent for the purpose of investing this money. (R., p. 28.) That as his agent he invested it in the property in question. (See Book.) That he took the title to himself, without Mr. Buck's knowledge or consent. (R., pp. 28, 29.)

That he held the money as his agent appears from the statement which he gave Mr. Buck.

That he paid this money for the property in question also appears from his statement and his private book of account, which has been offered in evidence. (R., p. 70.)

That the relation of principal and agent existed between them, and that while this relation existed, his taking the property in his own name, and paying for it out of the moneys bolonging to Mr. Buck, shows that he was guilty, if not of a moral fraud, of a constructive fraud.

Story defines fraud to be:

> "Fraud, in the sense of equity, properly includes all acts of omissions or concealments, which involves a breach of legal or equitable duty, trust or confidence."

This doctrine has received the interpretation of the courts in numerous cases.

Johnson *vs.* Dougherty, 18 N. J., Eq., 406.
Mich. Ry. *vs.* Mulligan, 44 Mich., 321.
Watson *vs.* Adams, 12 R. I., 466.
McMurray *vs.* Mobley, 13 Ark., 309, and cases heretofore cited.

I would further state that Charles F. Brainard, under the facts of this case, was not the debtor of L. L. Buck, but he was the custodian of funds placed in his hands by said Buck for purposes of investment, and was, therefore, the personal representative of said Buck in the management of said funds, and stood in a fiduciary relation to said Buck concerning the same. The funds which he received from said Buck were impressed with a trust, and when said funds were invested in the real estate in question, said real estate became impressed with a trust, and when said Buck learned that his funds had been invested in real estate, the legal title to which was in the said Brainard, his trustee, then he had a right to make his election as to whether he would demand the legal title to said real estate or no, since his funds had been invested in the same.

In the case of Bibb *vs.* Hunter, 79th Alabama, 352, 361, the Court, quoting Chancellor Kent, states the rule of law applicable to simple resultings trusts, then says: "This rule must be understood as referring to simple resulting trusts, as distinguished from investments of trust funds by trustees,

or other persons acting in a representative or fiduciary capacity."

Felix *vs.* Patrick, 145 U. S., 317, 328.
Day *vs.* Roth, 18 N. Y., 453.
1 Spence, 509, 511.
2 Pom. Eq. Jur., Sec. 1030.
Overseers of the Poor *vs.* Bank of Va., 2 Gratt, 544.

"The right or option of the *cestui que* trust is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent repurchase of the trust property," etc.

Oliver *vs.* Piatt, 3 Howard, 333, 401.

"If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor of his principal."

F. & M. National Bank *vs.* King, 57 Pa. State, 202, 208.

The principle of equity jurisprudence upon which the appellee relies for redress is clearly stated, we think, in the following quotation:

"There are two principles upon which a court of equity acts in exercising its remedial jurisdiction. * * * One is that it will not permit the Statute of Frauds to be used as an instrument of fraud, and the other, that when a person, through the influence of a confidential relation, acquires title to property, or obtains an advantage which he can not conscientiously retain, the court, to prevent the abuse of confidence, will grant relief." 169 U.S. 398, 405

Mr. Charles F. Brainard's account book shows that he kept Mr. Buck's funds separate and apart from his own, and that on the 18th day of July, 1879 (Rec., middle of page 10), he took from Mr. Buck's funds the sum of $2,550.00,

and invested the same in the house and lot in question; and on March 12, 1880 (Rec., near top of page 11), he again used of Mr. Buck's money the sum of $1,266.66 in making a further payment on said house and lot. On June 8th, 1880, Mr. Brainard still retained of Mr. Buck's money (Rec., page 11), the sum of $793.58. On said date last mentioned it will be observed, as shown by Mr. Brainard's account book, that he had invested in said real estate and retained in his possession, funds belonging to said Buck, in the amount of the sums above set forth; that is to say, $4,610.24. Mr. Charles F. Brainard died in May, 1881 (Rec., page 27). Mr. Buck, through his sister, Mrs. Charles F. Brainard, March 17, 1882 (Rec., bottom of page 38 and top of page 39), made a further payment on said real estate of $1,972.81. Therefore, it will be observed that the said Charles F. Brainard had, for investment in said property, funds belonging to Mr. Buck, in the said amount of $4,610.24, and that the said Buck invested in said property the further sum of $1,972.81 after the death of said Brainard. The property, therefore, cost Mr. Buck the amount of the two sums last named, to wit, $6,583.05. Deduct from this the amount that the said Brainard agreed to pay for the property in question, to wit, $6,350.00, and there remains a balance of $233.05. The property in question consequently cost Mr. Buck in moneys advanced by him nearly twenty years ago $233.05 more than the price which Mr. Charles F. Brainard agreed to pay for the same.

IV.

It cannot be claimed in this case that the plaintiff, Mr. Buck, is chargeable with laches in not asserting his title to the property in question at the time of the death of Mr. Brainard, or at the time of the conveyance to him by Mr. Brainard.

The Supreme Court say:

> "Where the possession has been peaceable possession of the property for several years prior to the assertion of title against him, he need not take steps to establish his title."

Quoting the case of Mills *vs.* Lockwood, 42 Ill., 111, they say:

> "Laches, we submit, in a court of law as well as a court of equity, cannot be imputed to one in the peaceful possession of land, for delay in resorting to a court of equity, on account of a mistake in the description of the premises in one of the conveyances through which the title must be deduced. The possession is notice to all of the possessor's rights and he need not assert them only when he may have occasion for it."
>
> Ruckman *vs.* Corey, 129 U. S., 397.

V.

The defendant, William H. Brainard, we submit, is not entitled to relief; neither should he be permitted to prosecute his suit at law by reason of his long delay in asserting his title.

Mr. Brainard died in May, 1881. (R., p. 27.) William H. Brainard, the defendant in this action, began his suit at law in July, 1897. He permitted a period of sixteen years and three months to elapse before making any claim of title whatever to this property. And as we have said, he also permitted the plaintiff in this suit, Mr. Buck, to make a payment of $1,971.82 on the property, after Mr. Brainard's death, and only claims a right to the property by reason of the fact that there was a mistake made by Charles F. Brainard, in not republishing his will after the purchase of the property.

The Supreme Court say by Mr. Justice Harlan, in Richards *vs.* Mackall, 124 U. S., where the plaintiff claims his right to the property after nearly twelve years had elapsed:

> "After the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information during the whole of that period, of every fact now relied upon by him, he comes into a court of equity, and asks it to adjudge him to be the owner of the property, and only because of the mistake of the officer in not so describing the premises,

in the advertisement of sale, and in the conveyance as to properly identify them. In our judgment, he is not entitled to claim the interference of a court of equity."

In this case it would seem particularly inequitable to permit the defendant to assert claim to this property, after the lapse of nearly seventeen years, and after all the witnesses to the transaction, who knew of the facts connected with it, have passed away. Mrs. Brainard has died. The building association in which Mr. Brainard invested his money have failed, and their books have been lost or destroyed.

The Court of Appeals of the District of Columbia say in a case similar to the one at bar:

> "And apart from all grounds and considerations in support of the demurrer to the bill, the laches or lapse of time would seem to furnish a complete bar to the relief sought in this action. Mrs. Lane and Mr. Carpenter are both dead. * * * It is well settled that laches and undue lapse of time constitute a good defense in equity and one that may be availed of in support of the bill."
>
> Cammack *vs.* Carpenter, 3 D. C. App., 219.

It is respectfully submitted that the decree of the Court below should be affirmed.

JAMES COLEMAN,
Solicitor for Complainant Leffert L. Buck.

NOTE.—Two mistakes occur in the printed Record, which counsel for the Appellants have agreed may be corrected on the hearing. The words, "This money was paid TO me by Mr. Brainard," should read "this money was paid BY me to Mr. Brainard" (Rec., p. 59), and in the top line on p. 60, of the Rec., the word settlement should read *statement*.

No. 110.

Brf. of Brookshire for Appellees

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JAMES H. McKENNEY,
Clerk.

Filed Jan. 14, 1902.

Supreme Court of the United States.

October Term, 1901.

WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD and EVA HANMORE, Appellants,

vs.

LEFFERT L. BUCK *et al.*, Appellees.

No. 110.

Brief of Nelson L. Robinson, for Appellees.

E. V. Brookshire

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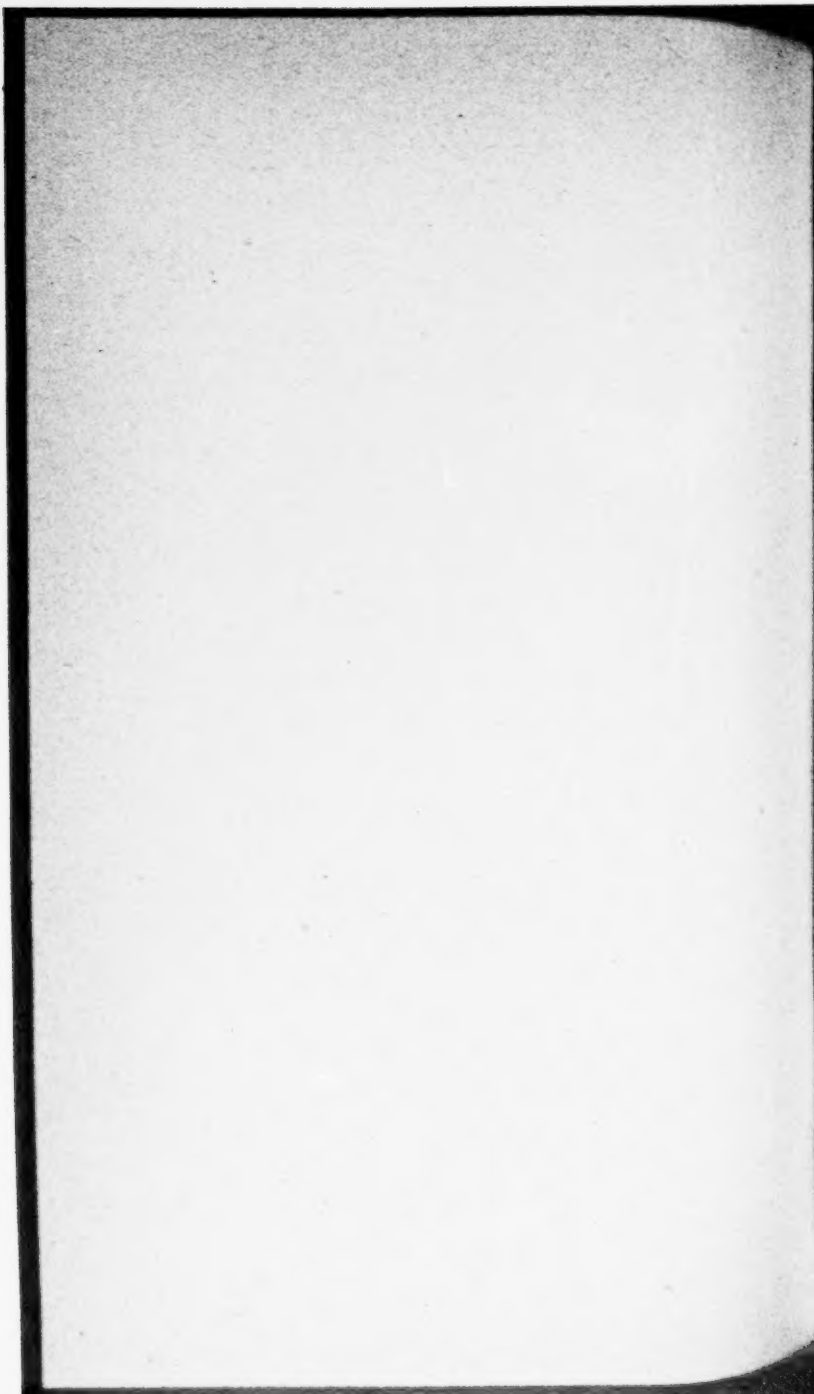

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STATEMENT OF FACTS.

The complainant below, Leffert L. Buck, a citizen of New York, was a brother-in-law of the deceased Charles F. Brainard, through whom as an heir at law the appellant, William H. Brainard, claims an interest in the real property at No. 1632 Rhode Island avenue in the city of Washington, which is the subject-matter of this suit. In 1875, when about to go to South America to reside, Mr. Buck began to send money in various sums to Mr. Charles F. Brainard, as his agent, for investment. (*Record, pp. 27, 28; Exhibit A,* * *pp. 9–11, 73–75.*) After his return to New York in 1876 Mr. Buck continued this practice. With the money thus furnished by Mr. Buck Mr. Brainard bought United

* Wherever "Exhibit A" is mentioned in this brief, pages 2, 3, 4 and 5 of Mr. Brainard's account book, (*Record, pp. 9–11,*) are meant.

States and District of Columbia bonds, selling the same and investing in others as the market seemed favorable, and collecting the interest thereon; and in July, 1879, he had in his possession money and bonds belonging to Mr. Buck to the amount of upwards of $2,600. Mr. Brainard was a clerk in the U. S. Treasury, dependent upon his salary for his support, and had no home of his own. Shortly before the purchase of the property in question, Mr. Buck, who wished to provide a home for his sister, Mrs. Brainard, as well as headquarters in Washington for himself, suggested that Mr. Brainard and he should buy a house together, and that each should pay one-half of the purchase money. (*Record, pp. 28, 29.*) Mr. Brainard orally assented to this proposal, which was not in writing; but the proposal as thus made and assented to was never acted upon. Instead, on July 18, 1879, Mr. Brainard sold bonds belonging to Mr. Buck to the amount of $2,553.37, and on the same day bought the property at No. 1632 Rhode Island avenue for $6,350, of which he paid down $2,550 out of Mr. Buck's money then in his hands, proceeds of the sale of the bonds. (*Record, Exhibit A and Mr. Brainard's written statement of the transaction, pp. 73–75.*) Without Mr. Buck's knowledge or authority from him Mr. Brainard took a deed of the property in his own name and gave a trust deed thereon to secure three notes made by himself for $1,266.66 each, the balance of the purchase price. (*Record, pp. 5, 6, 28, 29.*) He then moved into the house. Mr. Buck continued to send him money from time to time as before, and March 12, 1880, he paid the first of the three notes with money received from Mr. Buck. Mr. Brainard kept a careful record of these transactions in his private book of accounts, on one side of which he credited Mr. Buck with the amounts received from him, with proceeds of the sale of bonds and with interest collected, while on the other side he charged Mr. Buck with all payments made on the house, including payments for insurance and repairs and *for recording the deed of the property.* This account closes with entries in June, 1880, when Mr. Brainard still had an unexpended balance of Mr. Buck's money, amounting to $793.58. This book was found among Mr.

Brainard's effects after his death, and shows conclusively that Mr. Brainard understood that Mr. Buck was the real owner of the house and that he held the title as trustee for Mr. Buck. He had not paid one penny of the purchase money himself. At this time Mr. Brainard was suffering from the disease of which he afterwards died May 13, 1881. At some time early in 1880 Mr. Brainard informed Mr. Buck that he had taken the deed in his own name, and during the summer of that year he rendered him a written account of their transactions, agreeing with the entries in his book, and showing the balance of $793.58 still in his hands. (*Record, pp. 28, 29, 58, 73–75.*) At the same time he offered in writing to give Mr. Buck his note for the surplus over one-half the cost of the house paid by Mr. Buck and to pay Mr. Buck interest and rent. (*Record, pp. 29, 73.*) Naturally, Mr. Buck refused this offer and told Mr. Brainard that he would pay the amount unpaid on the property if Mr. Brainard would deed it to him. Mr. Brainard then said he hoped to get well and, if he did, that he would like to pay for the whole of the property and own it; and that in any event it would go to his wife, Mr. Buck's sister, at his death; that all his property would go to her. (*Record, pp. 29, 30.*) Mr. Buck was willing that the property should become his sister's and, relying upon Mr. Brainard's assurance that it would go to her and because of Mr. Brainard's serious illness, said no more to him about the matter. Mr. Brainard gave no note and paid no interest nor rent to Mr. Buck, but continued to live in the house until his death. (*Record, p. 60.*) Before the purchase of the property Mr. Brainard had made a will, which was admitted to probate in 1881, leaving all his property both real and personal to Mrs. Brainard. (*Record, p. 5.*) After her husband's death Mrs. Brainard informed her brother, Mr. Buck, that she had the legal title to the house under the will, and upon her executing a conveyance of the property to him he sent her $2,000, out of which she paid on March 17, 1882, the balance of the purchase money secured by the trust deed, $1,972.81, and obtained a discharge of the trust deed. (*Record, pp. 32, 33, 34, 37, 38, 39.*)

It appears by documentary evidence, *i. e.*, Mr. Brainard's

account book and the written statements given by him to Mr. Buck, and the draft for the last payment with the memorandum attached, that the following payments on the house were made with Mr. Buck's money:

1879, July 18,	$2,550.00	
1880, Mch. 12,	1,266.66	Cost of house $6,350.00
1882, Mch. 17,	1,972.81	5,789.47
Total	$5,789.47	$560.53

Leaving $560.53 paid between the date of the last entry on Mr. Brainard's statement of account and the date of the last payment of $1,972.81, as to which the only evidence that the payment was made with Mr. Buck's money is the fact that Mr. Brainard still had, when he rendered the account, an unexpended balance of $793.58 cash belonging to Mr. Buck, which was never repaid to Mr. Buck. (*Record, p. 33.*)

The account book contains entries of payments made by Brainard to various loan associations before his death, which perhaps account for this $560.53 and the interest on the trust deed. In view of the fact that all the other payments were made with Mr. Buck's money, it would not be a difficult presumption to hold that these payments were made out of the $793.58; but under counsel's theory of the law governing the case, as will hereafter appear, it is not necessary to determine this question. Furthermore, none of the payments to building associations, except possibly those to the Western association, is in any manner connected with the house transaction.

Mrs. Brainard lived in the house without paying rent, and partially supported by her brother, Mr. Buck, until her death, March 31, 1892; and thereafter Mr. Buck remained in undisturbed possession of the property until July, 1897, more than sixteen years after Mr. Brainard's death, when the appellant William H. Brainard brought an action of ejectment on the law side of the court below against Mr. Buck and the appellee, Mr. Coleman, who is a lessee under Mr. Buck, to recover possession of an undivided one-third of the property with damages for withholding the same.

It should be observed that Mr. Charles F. Brainard left no descendants: His heirs at law are his sisters, Mrs. Caroline Farrar and Mrs. Frances Peck; a brother, the appellant William H. Brainard; a niece, Mrs. Mary E. Day, and a nephew, the appellant, Edward Albert Brainard. The niece and nephew are children of different deceased brothers. Hence, the appellant, William H. Brainard, is an heir at law of only one-fifth of Mr. Charles F. Brainard's estate, though in his action at law he claimed one-third. Mrs. Farrar, Mrs. Peck, and Mrs. Day quit-claimed the property to Mr. Buck after the beginning of the action at law and before the filing of the bill in this action, which was brought to quiet Mr. Buck's title and to restrain the appellant, William H. Brainard, from further prosecuting his action at law. The appellant, Edward Albert Brainard, is a minor and could not quit-claim; the appellant, Eva Hanmore, is his mother, and the widow of a deceased brother of Mr. Charles F. Brainard.

The Supreme Court of the District of Columbia rendered a decree in favor of the appellees, which was affirmed on appeal by the Court of Appeals of the District. From the judgment of affirmance the present appeal was taken.

POINTS.

I.

When Mr. Charles F. Brainard, acting in a fiduciary capacity as the trusted business adviser and agent for the purpose of making investments of Mr. Buck, invested Mr. Buck's money in the property in question and, paying nothing himself, took the title in his own name without Mr. Buck's knowledge, a constructive trust arose and he took the title as trustee for Mr. Buck.

Witts *vs.* Horney, 59 Md., 584.
Keller *vs.* Keller, 45 Md., 270.
Crocker *vs.* Crocker, 31 N. Y., 507.
Moffatt *vs.* Shepard, 2 Penn., 66.
Depeyster *vs.* Gould, 3 N. J. Eq., 474.

Hall *vs.* Sprigg, 7 Mart. O. S., 243.
Rose *vs.* Hayden, 36 Kan., 106.
Burden *vs.* Sheridan, 36 Iowa, 125.
Phillips *vs.* Crammond, 2 Wash. C. C., 441.
2 Story, Eq. Jur. (13th ed.), Sects. 1201, 1211a, 1265, and cases cited.
2 Pom. Eq., Sec. 1037, and cases cited.
Greenleaf's Cruise on Real Prop., I., pp. 372, 392.
Ryall *vs.* Ryall, Amb. Rep., 413.
Lane *vs.* Dighton, *Id.*, 409.
Prevost *vs.* Gratz, 1 Pet. C. C., 364.

II.

Where a trustee or other person standing in a fiduciary capacity makes a profit out of any transaction within the scope of his agency or authority, that profit will belong to the cestui que trust. In cases of this sort the cestui que trust is not bound at all by the act of the other party. He has, therefore, an option to insist upon taking the property; or he may disclaim title thereto and proceed upon any other remedies to which he is entitled, either in rem or in personam.

Story's Eq. Jur., (13 ed.,) Secs. 1261–2, and cases cited.
Day *vs.* Roth, 18 N. Y., 448.

III.

The appellants are estopped from claiming that the title to the property did not pass under Mr. Brainard's will to Mrs. Brainard and under the deed from her to Mr. Buck.

Mfrs. Bank *vs.* Hazard, 30 N. Y., 226.
Blair *vs.* Wait, 69 N. Y., 113.
Continental Nat. Bk. *vs.* Nat. Bk., 50 N. Y., 575.
Voorhis *vs.* Olmstead, 66 N. Y., 113.

IV.

The appellees have not been guilty of laches.

18 Am. and Eng. Ency. of Law, (2 ed.) Title, Laches, Subdiv. VII, 7, page 125, and cases cited.
Townsend *vs.* Vanderwerker, 160 U. S., 176.
Ruckman *vs.* Cory, 129 U. S., 387.
Stedman *vs.* Davis, 93 N. Y., 32.

V.

The original and the amended bills were neither repugnant nor contradictory. And if the amended bill is defective in any point, it should be amended in furtherance of justice to conform to the facts proved.

1 Barbour's Chanc. Pr. (2 rev. ed.) p. 217, and cases cited.
Jones *vs.* Van Doren, 130 U. S., 684.

VI.

The decree was just and equitable and should be affirmed with costs.

ARGUMENT.

The principles upon which the decree was rendered are elementary principles of equity jurisprudence, as ancient and well known as the history of this branch of law. Citasions in support of them could be multiplied indefinitely, but it is unnecessary to add to the text-books and cases cited by Mr. Coleman. Counsel will merely call attention to the following :

I.

When Mr. Charles F. Brainard, acting in a fiduciary capacity as the trusted business adviser and agent for the purpose of making investments of Mr. Buck, invested Mr. Buck's money in the property in question, and, paying nothing himself, took the title in his own name, without Mr. Buck's knowledge, a constructive trust arose and he held the title as trustee for Mr. Buck.

(*a*) If an agent invests his principal's money in land and

takes a deed in his own name, with or without the principal's consent, a trust will arise.

Witts *vs.* Horney, 59 Md., 584.
Keller *vs.* Keller, 45 Md., 270.
Crocker *vs.* Crocker, 31 N. Y., 507.
Moffatt *vs.* Shepard, 2 Penn., 66.
Depeyster *vs.* Gould, 3 N. J. Eq., 474.
Hall *vs.* Sprigg, 7 Mart. O. S., 243.
Rose *vs.* Hayden, 35 Kan., 106.
Burden *vs.* Sheridan, 36 Iowa, 125.
2 Pom. Eq., Sec. 1037.

Where a purchaser buys with trust money lands and takes the deed to himself, he who is entitled to the money may follow the same and consider the purchase made for his own use and the purchaser as his trustee.

Phillips *vs.* Crammond, 2 Wash. C. C., 441.

> "The clear result of all the cases, without a single exception, is (as has been said by an eminent judge) that the trust of the legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchaser and others jointly, or in the names of the others without the purchaser; whether jointly or severally (*successive*), results to the man who advances the purchase money."
>
> 2 Story's Eq. Jur. (13th ed)., Sects. 1201, 1211a, 1265, and cases cited.

If such be the law as to resulting trusts, the same conclusion will inevitably be reached where the trust is constructive, founded upon a legal fraud, as in the case at bar.

(*b*) The evidence that Mr. Brainard used Mr. Buck's money to make the payments on the house is as direct and conclusive as evidence well can be. It consists of Mr. Brainard's signed written statements delivered by him to Mr. Buck, and a private book of accounts kept by Mr. Brainard and found among his papers after his death. The argument of appellants' counsel that these papers show payment by Mr. Buck out of moneys advanced by Mr. Brainard is too absurd to require comment.

Evidence of a resulting trust (and *a fortiori* of a constructive trust) may be deduced from a memorandum or note of the nominal purchaser, or from papers left by him and discovered after his death.

Greenleaf's Cruise on Real Prop., 1, pp. 372, 392.
Ryall *vs.* Ryall, Amb. Rep., 413.
Lane *vs.* Dighton, *Id.*, 409.

Where the grantee of land had in an account between him and the grantor, made out subsequently to the deed, given the grantor credit for the proceeds of a part of the land conveyed by the deed, this amounts to a declaration of trust and repels the idea that the conveyance was absolute.

Prevost *vs.* Gratz, 1 Pet. C. C., 364.

(c) In this connection it should be remarked that only those entries in Mr. Brainard's book, which are part of the account with Mr. Buck, or can be connected with the purchase of the house, are competent evidence in this suit.

The same rule prevails as to the declarations of Mr. Charles F. Brainard testified to by the appellant, William H. Brainard. They were made to a third party, and are also incompetent on the ground that they are merely hearsay and were made subsequently to the transactions referred to, in so far as that is the case. Most of these declarations, however, were made before the purchase, to the effect that Mr. Brainard intended to buy a house, and were immaterial as well as incompetent.

The complainants' case was established at every point by documentary evidence, consisting of the admissions in the answer, the account book kept by Mr. Brainard, the written statement furnished by him to Mr. Buck, the certificate of deposit for $2,000 with which the last payment on the house was made after Mr. Brainard's death, the deeds of the property, and the will of Mr. Brainard.

The proofs offered by the appellants failed to support the answer. When scrutinized, it will be observed that the deposition of William H. Brainard was wholly hearsay and in great part incompetent as well as irrelevant to the issues.

II.

Where a trustee or other person standing in a fiduciary capacity makes a profit out of any transaction within the scope of his agency or authority, that profit will belong to the cestui que trust. In cases of this sort the cestui que trust is not bound at all by the act of the other party. He has, therefore, an option to insist upon taking the property, or he may disclaim title thereto and proceed upon any other remedies to which he is entitled, either in rem or in personam.

Story's Eq. Jur., (13 ed.), Sects. 1261–2, and the cases cited.

Day *vs.* Roth, 18 N. Y., 448.

When he learned that Mr. Brainard had taken title in his own name, Mr. Buck had a right to claim the property; or, refusing it, to sue to recover his money; or to enforce his equitable lien against the property for the amount of his money which had gone into it.

III.

The appellants are estopped from claiming that the title to the property did not pass under Mr. Brainard's will to Mrs. Brainard and under the deed from her to Mr. Buck.

Whether Mr. Brainard did or did not know that his will would not pass title to after-acquired real estate is immaterial. He stated to Mr. Buck, for the purpose of inducing him to allow the situation to remain as it was, that the property would go to his wife. Mr. Buck believed this statement, and, induced thereby, took no steps to enforce or preserve his rights until after Mr. Brainard's death. All the elements of an estoppel exist.

It is not necessary to an equitable estoppel that there should be a design to mislead.

Mfrs. Bank *vs.* Hazard, 30 N. Y., 226.

Blair *vs.* Wait, 69 N. Y., 113.

A party need not have acted affirmatively upon a declaration, to claim an estoppel, if he has been led thereby to refrain from using means to retrieve his position.

Continental Nat. Bk. *vs.* Nat. Bk., 50 N. Y., 575.
Voorhis *vs.* Olmstead, 66 N. Y., 113.

IV.

The appellees have not been guilty of laches.

Having an equitable title and believing that he had a legal title, Mr. Buck remained in undisturbed possession of the property for more than fifteen years, from March 31, 1882, when he took the conveyance from Mrs. Brainard, until July, 1897, when the appellant William H. Brainard brought his action of ejectment.

An owner of an equitable title in possession is not obliged to take steps to establish his title until his possession is disturbed or his title attacked.

18 Am. and Eng. Ency. of Law, 2d ed., Title, Laches, Subdiv. VII, 7, p. 125, and cases cited.
Townsend *vs.* Vanderwerker, 160 U. S., 176, 185, 186.
Ruckman *vs.* Corey, 129 U. S., 387, 389.

Moreover, Mr. Buck, a non-resident, is not chargeable with notice of the law of the District of Columbia now obsolete, that a will did not then pass after acquired realty.

Stedman *vs.* Davis, 93 N. Y., 32.

V.

The original and the amended bills were neither repugnant nor contradictory. And if the amended bill is defective in any point, it should be amended in furtherance of justice to conform to the facts proved.

(*a*) Paragraph 8 of the original bill stated fully and truly, as Mr. Buck understood them, the motives that influenced Mr. Brainard to take title in his own name; it also stated the reasons which led Mr. Buck to propose the pur-

chase of the house together and to consent that his money should be used for that purpose. Paragraph 9 of the amended bill contains matter which Mr. Buck desired to omit if possible when he brought this action, *i. e.* the facts constituting the constructive fraud on the part of his brother-in-law. Every statement in both bills is strictly true and all the statements are consistent with each other.

(*b*) The statement in paragraph 8 of the original bill, that Mr. Charles F. Brainard understood and believed that the property would pass under his will to his wife, was inadvertently omitted by counsel in drawing the amended bill. Proof of this fact, however, was admitted upon the hearing without objection on the part of appellants' counsel. Hence, if this allegation was necessary in the amended bill, an amendment inserting it should be allowed in furtherance of justice.

1 Barb. Chan. Pr. (2 rev. ed,), p. 217, and cases cited.

Jones *vs.* Van Doren, 130 U. S., 684, 690.

(*c*) Appellants' counsel has seemed to lose sight of the main point in the case, which is, that though Mr. Buck suggested the purchase of the property and consented to the use of his money to provide a home for his sister, he did not consent that the title should be taken in Mr. Brainard's name; that this act was without Mr. Buck's knowledge, consent or authority; and that, when it came to Mr. Buck's knowledge, Mr. Buck was induced by Mr. Brainard's statement, that the property would pass to Mrs. Brainard under the will, to sleep on his rights and allow matters to rest *in statu quo* until after Mr. Brainard's death and until the action in ejectment was brought, when reparation was impossible.

VI.

The decree appealed from was just and equitable and should be affirmed with costs.

No reversible error was committed upon the hearing. It has been established beyond question that Mr. Buck's money paid for the property; that Mr. Charles F. Brainard be-

lieved that he held title as trustee for Mr. Buck and was very careful to leave written evidence of this fact, in order that Mr. Buck's rights should be protected; and that Mr. Charles F. Brainard and therefore his heirs were estopped from claiming title by his statement, made to and acted upon by Mr. Buck, that the property would pass under the will to Mrs. Brainard, through whom Mr. Buck claims.

Respectfully submitted,

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